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No. 01-1867

IN THE

Supreme Court of the United States

PHILLIP MULDER, *et al.*,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD, *et al.*
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR LOCALS 7 & 951, UNITED FOOD & COMMERCIAL WORKERS IN OPPOSITION TO THE PETITION FOR CERTIORARI

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STATEMENT

Under the National Labor Relations Act, as interpreted in *Communications Workers v. Beck*, 487 U.S. 735 (1988), a union may require bargaining unit employees covered by a union security clause who are objecting nonmembers to bear their share of the costs of union activities that are "germane to the union's role in collective bargaining" but not of the costs of "nongermane" union activities. *California Saw & Knife Works*, 320 NLRB 224, 239 (1995), *enf'd sub nom. Machinists v. NLRB*, 133 F.3d 1012 (7th Cir.), *cert. denied sub nom. Strang v. NLRB*, 525 U.S. 813 (1998).

In the instant case, the National Labor Relations Board concluded "that, at least with respect to organizing within the same competitive market as the bargaining unit employer, organizing expenses are chargeable to bargaining unit employees under the *California Saw* standard." Pet. App. 52a-53a (footnote omitted).

On a petition for review, the *en banc* Ninth Circuit unanimously sustained the Board's conclusion that "for NLRA industries, organizing within the competitive market is germane to collective bargaining." Pet. App. 13a.

ARGUMENT

The instant case is the first—and to date the only—case in which the National Labor Relations Board has addressed the extent to which NLRA union organizing activities are "germane to the union's role in [the NLRA] collective bargaining [system]" and thus chargeable to objecting nonmembers under this Court's decision in *Communications Workers v. Beck*, 487 U.S. 735 (1988). The NLRB's limited and nuanced ruling—that "[union] organizing within the same competitive market as the [union organized] bargaining unit employer" is "germane to the union's role in [the NLRA] collective bargaining [system]" and thus is "chargeable to bargaining unit employees"—is an entirely sound construction of the NLRA by the agency charged with administering the Act. And, by definition, the Ninth Circuit decision affirming that NLRB ruling is *not* a decision that generates any conflict among the circuits. Equally to the point here—and contrary to the petitioners' central argument for a grant of *certiorari*—nothing in this Court's *Beck* decision or in the decision in *Ellis v. Railway Clerks*, 466 U.S. 435 (1984), speaks directly to the issue decided by the Board, and nothing in the *Beck* and *Ellis* decisions or in the reasoning of those decisions is in any way inconsistent with

the Board's decision. For all these reasons, this is not a case that calls for this Court's review, and the petition for *certiorari* should therefore be denied.

1. In explaining its ruling, the Board began from the proposition that the language and policies of the Act reflect "Congress' understanding that organization of multiple groups of employees, not just a single bargaining unit or the employees of a single employer in an industry, was necessary to achieve its goal of stabilizing wage rates and preventing depression of employees' wage rates and purchasing power." Pet. App. 53a & 54a.[1] And, the Board summarized "the evidence . . . demonstrat[ing] that, under the National Labor Relations Act, organizing is both germane to a union's role as a collective-bargaining representative and can benefit all employees in a unit already represented by a union" as follows:

> "Unions are able to negotiate higher wages for the employees they represent when the employees of employers in the same competitive market are organized, and unions are less able to do so when they are not organized. Thus, represented employees, whether or not they are members of the union that represents them, benefit, through the results of collective bargaining, from that union's organization of other employees." Pet. App. 59a.

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[1] *See Apex Hosiery Co. v. Leader*, 310 U.S. 469, 504 n. 24 (1940), where this Court observed that the NLRA is "aimed at protecting and favoring labor organizations and eliminating the competition of employers and employees based on labor conditions regarded as substandard, through the establishment of industry-wide standards . . . by collective bargaining." As its preamble states, the Act's purpose is to achieve "the stabilization of competitive wage rates and working conditions within and between industries" by "encourag[ing] the practice and procedure of collective bargaining." 29 U.S.C. § 151.

Judge Posner—in addressing the correctness of the NLRB's general *California Saw* "germane to collective bargaining" standard—elucidated the logic of the Board's point in this case by explaining "the economic interdependence of bargaining units" where "different employers were competing." *Machinists v. NLRB*, *supra*, 133 F.3d at 1016. In these circumstances, Judge Posner observed, "[t]he union's ability to extract higher wages from the first employer will be constrained by the competition of the second employer, who may be paying lower wages and thus incurring lower operating costs." *Id.* For just that reason, it is "in the interest of the [employees] in the first firm, . . . that the union succeed in negotiating an advantageous collective bargaining agreement for the competing firm's [employees]." *Id.* And, of course, as the Board recognized in its decision here, the union cannot negotiate such an agreement at the competing firm, if it does not represent that firm's employees.

In enforcing the NLRB's *California Saw* decision, the Seventh Circuit observed that "[i]t is hard to think of a task more suitable for an administrative agency that specializes in labor relations, . . . than crafting the rules for translating the generalities of *Beck* . . . into a workable system for determining and collecting agency fees." *Machinists*, 133 F.3d at 1015. *Accord Thomas v. NLRB*, 213 F.3d 651, 657 (D.C. Cir. 2000). That being so, "[a]ll the details necessary to make the rule of *Beck* operational were left to the Board." *Machinists*, 133 F.3d at 1015. *See, e.g., Marquez v. Screen Actors Guild*, 525 U.S. 33, 43 (1998)("[t]he Board is currently in the process of . . . giv[ing] guidance to unions about what they must do . . . under *Beck*"). The careful, step-by-step approach to defining what is germane to the NLRA collective bargaining system, represented by the Board's decision here, is an exemplar of responsible interstitial administrative law making. *See* Pet. App. 53a n. 20 (emphasizing the narrow scope of the holding in this case).

2. Against the foregoing, the petitioners argue that this Court's *Beck* and *Ellis* decisions preclude the NLRB's decision here and, indeed, preclude the Board from making *any* independent inquiry into whether NLRA union organizing is in whole or in any part germane to the NLRA collective bargaining system. *See* Pet. 19 ("any coherent reading of *Ellis* and *Beck* shows that this Court has already determined the clear meaning of RLA § 2, Eleventh and NLRA § 8(a)(3) on the issue presented").

In support of their argument, the petitioners maintain that *Beck* stands for the proposition that each and every aspect of the Railway Labor Act "germane to collective bargaining" law carries over as a governing rule of NLRA law. Pet. 9. Thus read, the petitioners argue, *Beck* requires that each of the determinations made in *Ellis* as to which particular union activities are, or are not, germane to the RLA collective bargaining system—especially the determination that, as a general matter, organizing activity is not germane to the RLA system—is, *pro tanto*, an NLRA germaneness determination as well. Pet. 9.

The fatal flaw in the petitioners' effort to generate a conflict between the NLRB decision below and this Court's decisions is that *Beck* does *not* state any NLRA/RLA identity rule of the sort posited by the petitioners. And, far from supporting the petitioners' position, this Court's *Ellis* opinion confirms that the task of determining whether or not a union activity is germane to collective bargaining is sensitive to the statutory context, requiring close attention to the particular statutory collective bargaining system at issue.

(a) The sole question presented in *Beck* was whether NLRA § 8(a)(3)—in contrast to RLA § 2, Eleventh as interpreted in *Machinists v. Street*, 367 U.S. 740 (1961)—"permits a union, over the objections of dues-paying nonmember employees to expend funds so collected

[pursuant to a union security agreement] on activities unrelated to collective bargaining, contract administration, or grievance adjustment." 487 U.S. at 738.

Beck did *not* present, and the *Beck* Court did *not* decide, any question as to which particular union activities are related to collective bargaining and which are not. What the *Beck* Court did do was to treat the construction of RLA § 2, Eleventh in *Machinists v. Street* as "controlling" with respect to the NLRA question at hand. 487 U.S. at 745.

It was precisely to explain this reliance on *Street* that the *Beck* Court stated that "§ 8(a)(3) and § 2, Eleventh are in all material respects identical." 487 U.S. at 745. In context, then, what the Court meant by that statement—on which the petitioners here base their case—was that the two statutes are identical in all respects "material" to the question before the *Beck* Court, *viz.* whether the statute permits unions to require bargaining unit employees covered by a union security agreement—including objecting nonmembers—to finance the *full* range of union activities (including those that are unrelated to collective bargaining). The *Beck* Court did not say that the two statutes are identical in all respects material to the next-level question that arises if the answer to that threshold question is "no"—*viz.*, which particular union activities are related to collective bargaining and hence chargeable to all employees, and which are not related to collective bargaining and hence not chargeable. Indeed, the *Beck* Court, while recognizing the identity between the two statutes just noted, also recognizes that "the NLRA and RLA differ in certain crucial respects." *Id.* at 745.[2]

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[2] The petitioners' half-hearted attempt to generate a circuit conflict out of the lower court opinion in *Beck*, Pet. 21, fails for the simple reason that the chargeability of organizing was *not* an issue raised by on appeal to the Fourth Circuit.

The Fourth Circuit opinion in *Beck* explains that "[the CWA] defendants, in their brief in this court, limit themselves to two claims of

(b) In *Ellis v. Railway Clerks*, *supra*, the Court essayed the task of classifying a number of RLA union activities as

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error." *Beck v. Communications Workers*, 776 F.2d 1187, 1194 (4th Cir. 1985). The first claim of error went to the issue that was later decided by this Court in *Beck*, i.e., whether nonmembers had a right under the NLRA to object to payment of the non-germane portion of the agency fee. The CWA's "other claim of error relate[d] to the standard of proof to be used in resolving plaintiffs claim for a refund." *Id.* at 1195. The standard of proof issue was important, because the district court had disallowed the chargeability to objectors of 81% of CWA's expenditures, for the most part on the ground that the union had failed to prove by "clear and convincing evidence" that those expenditures were germane to collective bargaining. *Id.* at 1192-93.

The Fourth Circuit agreed that the district court had employed the wrong standard of proof. 776 F.2d at 1210. The court of appeals then stated, "Our problem, therefore, is to ascertain the findings or conclusions of the special master as confirmed by the district judge which may have been affected or influenced by the application of the incorrect standard of proof." *Id.* In this regard, the court of appeals noted that the lower court "found no occasion in dealing with four of the[CWA expenditure] classifications to inquire into the accuracy of the charges or the propriety of the classification[,] . . . because he found these groups to include charges impermissible against plaintiffs as a matter of law." *Id.*

This was pertinent because, on appeal, CWA had *not* challenged the legal rulings that led the trial court to disallow these four categories, including the ruling that organizing (one of the four categories) was not chargeable as a matter of law. That being so, the court of appeals concluded that "[t]he error in standard of proof had no connection with the findings and conclusions on the chargeability of expenditures in these four categories and cannot provide a justification for a reversal." 776 F.2d at 1211.

The appellate court then went on to consider "[t]he other expenditures listed under the broad classifications of 'collective bargaining,' 'grievance,' and 'contract administration,'" and concluded that, because "it seemed that expenditures under these headings were reviewed on their facts," the special master's conclusions might have been infected by the standard of proof error and had to be reversed. 776 F.2d at 1212.

In sum, the chargeability of NLRA union organizing was *not* an issue presented to—or decided by—the Fourth Circuit in the *Beck* case.

chargeable or nonchargeable to objecting employees by applying a "germane to collective bargaining" standard. In so doing, the *Ellis* Court paid close attention to the particulars of the RLA legislative scheme and the nature of the RLA collective bargaining system.[3]

Ellis thus makes it plain that the germaneness test does not call for a wholly abstract inquiry but rather for a concrete inquiry into the particular collective bargaining system as to which the "germaneness" of the activity in question is being determined and the statutory scheme governing that system. And, contrary to the petitioners' argument, it follows ineluctably that a determination that a particular union activity is or is not germane to collective bargaining that turns on the peculiarities of one statutory collective bargaining system—such as the *Ellis* determination on RLA union

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[3] To illustrate the point that *Ellis* proceeds by giving careful consideration to the RLA collective bargaining system and the RLA statutory scheme, we note the following: The *Ellis* Court found RLA union convention costs are chargeable on the ground that "Conventions such as those at issue here are normal events about which Congress was thoroughly informed." 466 U.S. at 448-449. *See id.* 449 n. 10 (citing hearing testimony). And, the *Ellis* Court found that RLA union social activities are chargeable on the basis of "a revealing statement [by] Senator Thomas, Chairman of the Senate Subcommittee" to the effect that "he did not want the bill to say that 'the unions . . . must not have any of the . . . kinds of little dues that they take up for giving a party, or something of that nature,' Senate Hearings, at 173-174," and the absence of any "indication that other Members of Congress were any more inclined to scrutinize the minor incidental expenses incurred by the union." *Id.* 450. In addition, the *Ellis* Court held that the portion of RLA union publications covering chargeable activities are chargeable on the grounds that "Congress can be assumed to have known that union funds go toward union publications," because "it is an accepted and basic union activity," and "[t]he costs of 'worker education' were specifically mentioned during the hearings. House Hearings, at 275; Senate Hearings, at 236." *Id.* 451.

organizing—is not transferable to other significantly different statutory collective bargaining systems.[4]

The *Ellis* Court made its most painstaking analysis of the RLA collective bargaining system and the RLA legislative scheme in determining the chargeability of RLA union organizing activity. And, in the end, the *Ellis* ruling that RLA union organizing expenditures are not chargeable rests on considerations peculiar to the RLA that proved determinative in the enactment of the 1950 RLA amendment authorizing union security agreements, considerations having nothing to do with the NLRA.

At all times pertinent to the framing of the RLA, the railroads operated essentially as regulated regional monopolies and not as direct competitors whose market positions are affected by relative labor costs. *See Union Pacific RR Co. v. United States*, 313 U.S. 450, 461 (1941). Given this context, the RLA was "infused with the purpose of

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[4] *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991)—a public sector case—provides further confirmation that whether an activity is "germane to collective bargaining" turns on the nature of the particular collective bargaining system established by the legislature in the particular statute in question.

In deciding "[t]he chargeability of expenses incident to preparation for a strike which . . . would have been illegal under Michigan law," the *Lehnert* Court first noted that "[h]ad the [union] actually engaged in an illegal strike, the union clearly could not have charged the expenses incident to that strike to [objectors]," because "no legitimate governmental interest . . . would be served by compelling objecting employees to subsidize activity that the State has chosen to disallow." 500 U.S. at 530 & 531. But, the Court went on to hold that "using dissenters' funds to threaten or prepare for such conduct" was entirely proper, as "[t]he Michigan Legislature . . . ha[d] chosen not to impose such a restriction" and the evidence indicated "that outward preparations for a potential strike serve as an effective bargaining tool." *Id.* Obviously, neither of these points apply in determining whether strike activities are "germane to collective bargaining" under the NLRA or the RLA.

securing self-adjustment between the effectively organized railroads and the equally effective railroad unions." *Street*, 367 U.S. at 760. And, when Congress took up the union security amendments to the RLA in 1950, it was informed that upwards of 85% of the railroad industry had been organized. *Id.* 754 & 762.

In light of the highly developed state of collective bargaining under the RLA, the principal justification advanced for legalizing RLA union security agreements was that "collective bargaining [in] the railroad industry is more costly from a monetary standpoint than that carried on in any other industry," because "[t]he administrative machinery is more complete and more complex." *Street*, 367 U.S. at 761.

At the same time, as the *Ellis* Court emphasized, George Harrison, the President of the Brotherhood of Railway Clerks and the principal union spokesman at the 1950 RLA hearings, "expressly disclaimed that the union shop was sought in order to strengthen the bargaining power of unions." 466 U.S. at 451. The Court added that, "[w]hen asked if the union shop would 'strengthen your industry-wide bargaining as [it] presently exists in the railroad industry,'" Mr. Harrison "replied: 'I do not think it would affect the power of bargaining one way or the other.'" *Id.* 451 n. 12.

Given that "presently exist[ing]" fully-organized RLA system of "industry-wide bargaining," the *Ellis* Court concluded that organizing under the RLA "can afford only the most attenuated benefits to collective bargaining." 466 U.S. at 451 n. 12 & 452. Indeed, in this context, the only argument for treating organizing as chargeable was that it enhanced "overall union power" and "what is good for the union is good for the employees." *Id.* at 451 & 452. Against that background and particularly in light of the express disclaimer by the railroad unions' spokesman that those unions were seeking to strengthen their bargaining position, the *Ellis* Court concluded that "organizational efforts were

not what Congress aimed to enhance by authorizing the union shop" in amending the RLA. *Id.* 452.

It is perverse for the petitioners to ascribe to the *Ellis* Court an intent that the Court's detailed scrutiny of the RLA legislative history—which delved into the minutiae of the 1950 hearings on amending the RLA—would control the NLRB's determination of whether NLRA union organizing is "germane" to the very different NLRA system of collective bargaining crafted by the 1935 and 1947 Congresses. To the contrary, what *Ellis* teaches is that the NLRB must engage in a similarly painstaking consideration of the nature of the NLRA collective bargaining system and the NLRA legislative scheme in making the NLRA union organizing germaneness determination. As we have explained, the Board has done just that and has reached a decision that reflects the differences between the NLRA and the RLA with respect to the role assigned to union organizing in each system, which, as this Court has explained, are "responsive to the difference between the 'embryo organizations in the industries covered by' the NLRA, and the already 'strongly organized' railway unions." *Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 385 n. 20 (1969), quoting 1 NLRB, *Legislative History of the National Labor Relations Act, 1935* at 1329 (1949).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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